

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Children's Television Obligations Of Digital)	MM Docket No. 00-167
Television Broadcasters)	

**PETITION FOR PARTIAL RECONSIDERATION OF
THE CHILDREN'S MEDIA POLICY COALITION**

Of Counsel:

Brian Stone
Law Student
Georgetown University Law Center

Jennifer L. Prime, Esq.
Angela J. Campbell, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

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Counsel for the Children's Media Policy
Coalition

SUMMARY

The Coalition commends the Commission for increasing the core programming obligations of digital broadcasters who provide additional streams of programming and making children's educational and informational programming easier to locate. The Coalition is pleased the Commission sought to increase the amount of children's educational programming by limiting broadcasters' ability to excessively replay and preempt their core programs and still fulfill their core programming obligations.

However, the Coalition is concerned that the rule limiting repeats can be misinterpreted. The Commission should clarify the rule so that broadcasters have to provide at least a 3-hour per week baseline of non-repeat core programming before it can repeat any core programs. This clarification will assure that broadcasters do not meet their higher programming benchmark by merely repeating core programs. In addition, the Coalition is concerned that the extent to which a broadcaster repeats core programs cannot be adequately monitored. Accordingly, the Coalition requests that Form 398 be revised to include information about the frequency and amount a broadcaster replays core programs.

Finally, the Coalition is concerned that the rule limiting preemptions is subject to misinterpretation. The Commission should clarify the rule so that the 10 percent preemption limit applies on a per-program basis. This will ensure that core programming is actually regularly scheduled.

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PETITION FOR PARTIAL RECONSIDERATION

Pursuant to 47 C.F.R. § 1.429(c), Children Now, The American Psychological Association, The American Academy of Pediatrics, Action Coalition for Media Education, The American Academy of Child and Adolescent Psychiatry, The Benton Foundation, The National Institute on the Media and the Family, The National PTA, and Office of Communication of the United Church of Christ, Inc. ("Children's Media Policy Coalition" or "Coalition") seek clarification and partial reconsideration of the Commission's *Children's Television Obligations Of Digital Television Broadcasters*, FCC 04-221, MM Docket 00-167 (rel. November 23, 2004). The Coalition commends the Federal Communications Commission ("FCC" or "Commission") for increasing the core programming obligations of those digital television broadcasters that choose to provide additional streams or channels of programming.¹ This commensurate increase will help ensure that digital broadcasters who choose to multicast will provide commensurate increases in educational and informational programming for children. The Coalition is also pleased that the Commission will require both analog and digital broadcasters to identify their

¹ *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943, App. B ¶ 3 (2004). ("Children's DTV Order") The rule changes announced in this Order have been codified at 47 C.F.R. §§ 73.225, 73.3526, 73.670, 73.671, 73.673 (2005). All further citations to these rules will be to the Code of Federal Regulations.

core programs with an E/I symbol that will be displayed throughout the program.² The Coalition believes the continuous display of the E/I symbol will help ameliorate “the continued lack of awareness on the part of parents and others of the availability of core programming.”³ In addition, the Coalition agrees with the Commission that children are uniquely vulnerable to advertising.⁴ The Coalition is pleased the Commission decided to apply advertising restrictions for children’s programming to both free and pay channels.⁵

While the Coalition supports the Commission’s efforts to limit the extent to which digital broadcasters may repeat programming and still have it count toward fulfilling their core programming obligations, the Coalition is concerned that the rule limiting repeats is subject to multiple interpretations. To ensure children have access to an increased amount of educational programming the Coalition urges the Commission to clarify this rule. In addition, the Coalition has recently become aware that broadcasters may excessively replay core programs to meet their core programming obligation. Because, it is difficult to determine the extent to which a broadcaster relies on replaying core programming the Commission should revise Form 398 to include information on the extent to which a broadcaster relies on replaying core programming.

Similarly, the Coalition is pleased that the Commission has limited the amount of core programs a broadcaster may preempt and still count as regularly scheduled. However, the Coalition is concerned that this rule is subject to misinterpretation. Accordingly, we request that the Commission clarify its intent to ensure that regularly scheduled programs are actually aired on a regular schedule.

² 47 C.F.R. § 73.671(c)(5) (2005).

³ *Children’s DTV Order* ¶ 17.

⁴ *Id.* ¶ 49.

⁵ 47 C.F.R §§ 73.670, 76.225 (2005). On the Commission’s own motion, the effective date for these rules have been extended from February 1, 2005 to January 1, 2006. *Children’s Television Obligations of Digital Television Broadcasters*, FCC 05-22 (rel. Jan. 31, 2005).

I. THE COMMISSION SHOULD CLARIFY ITS RULE LIMITING REPEATS TO MAXIMIZE THE EFFECTIVENESS OF CORE PROGRAMMING AND ADDRESS THE DIFFICULTIES IN MONITORING REPEATS OF CORE PROGRAMS

Congress and the Commission have tried to ensure broadcasters air sufficient amounts of educational and informational programming for children. In 1990, Congress passed the Children’s Television Act (“CTA”) to “increase the amount of educational and informational broadcast television programming available to children.”⁶

In 1991, the Commission adopted regulations implementing the CTA and subsequently found that “some broadcasters [were] carrying very little regularly scheduled standard-length programming specifically designed to educate and inform children.”⁷ As a result, in 1996, the Commission strengthened its children’s television rules and adopted a 3-hour processing guideline designed to increase the amount and effectiveness of educational programming available to children.⁸ In setting this 3-hour guideline, the Commission gave broadcasters scheduling flexibility by “allow[ing] the three-hour core programming benchmark to be averaged over a six-month period [and by] allow[ing] repeats and reruns of core programming to be counted toward fulfillment of the three-hour guideline.”⁹

Now, again, in 2004 the Commission has strengthened its children’s television rules to both improve children’s programming and provide guidance to broadcasters during the transition from an analog to a digital television environment.¹⁰ Specifically, in response to digital broadcasters ability to multicast multiple program streams, the Commission “adopt[ed] an

⁶ *Policies and Rules Concerning Children’s Television Programming, Report and Order*, 11 FCC Rcd, 10660, 10671 (1996) (“1996 Order”) (citing S. Rep. No.227, 101st Cong., 1st Sess. 1 (1989)).

⁷ 1996 Order at 10661.

⁸ *Id.* at 10718-22.

⁹ *Id.* ¶ 132, at 10723 (recognizing that, in practice, “virtually all network and syndicated programs are repeated to increase audience exposure”).

¹⁰ *Children’s DTV Order* ¶ 1.

approach to which digital broadcasters that choose to provide streams or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide.”¹¹

To ensure that this commensurate increase in core programming leads to an actual increase in original core educational programs available to children, the Commission adopted a requirement that “at least 50 percent of core programming cannot be repeated during the same week to qualify as core.”¹² (“50 Percent Rule”) The Commission’s action was premised on its belief that “[t]here is no indication now that analog core programming is repeated excessively.”¹³ Thus, by limiting repeats to 50 percent, the Commission could assure that broadcasters would not “simply replay the same core programming” while also respecting “that to some degree children can benefit from repeated viewing of the same core program.”¹⁴

A. The Commission Should Clarify The Rule Limiting Repeats To Fulfill Its Purpose of Maximizing the Amount and Effectiveness of Core Programming

The Coalition agrees strongly with the Commission that simply replaying core programming would not meet the needs of the child audience. As the Commission explained its rationale for prohibiting commonly owned stations in the same market from counting the same core programming toward the guideline, “[i]t would be inconsistent with this Congressional objective [to increase the amount of educational and information programming available to children] to permit commonly owned stations in a market to rely on the same programming to

¹¹ *Id.* ¶ 2. Those digital broadcasters who choose to multicast will have to provide “1/2 hour per week of additional core programming for every increment of 1 to 28 hours of free programming provided in addition to the main program stream.” 47 C.F.R. § 73.671(e)(2) (2005). .

¹² 47 C.F.R. § 73.671(e)(3) (2005).

¹³ *Children’s DTV Order* at ¶ 23 FN 55.

¹⁴ *Children’s DTV Order* ¶ 23.

meet the [core programming] obligations.”¹⁵ Digital broadcasters that choose to multicast as similar to broadcasters that own more than one station in a market because, in each case, a single company controls multiple program streams. Thus, for the same reasons, it would be inconsistent with Congressional objectives to allow digital broadcasters to simply air the same programming on two program streams.

Although the 50 Percent Rule is clearly intended to increase the availability of diverse children’s educational programs, the wording of the rule is subject to multiple interpretations. The rule simply states “at least 50 percent of core programming cannot be repeated during the same week to qualify as core.”¹⁶ The ambiguity in the 50 Percent Rule comes from not knowing whether the rule applies to only the commensurate increase in the broadcaster’s core programming obligations, or to the broadcaster’s total amount of core programming generated from both its main channel and any additional streams.

By applying the 50 Percent Rule to only the broadcaster’s commensurate increase in core programming, the broadcaster can fulfill its core programming obligation by repeating half of the programming from its main stream on to additional streams. Take, for example, a broadcaster with two streams, main channel “A” and secondary channel “B,” who airs an additional 168 hours of programming on channel “B” will be required to air a total of 6 hours of core programming per week (3 hours for channel “A” plus .5 hours for every increment of 28 hours on channel “B”).¹⁷ This hypothetical broadcaster would have to offer 3 hours of non-repeat core programming on its main channel, “A,” before it could replay any core programs. Once it

¹⁵ 2002 Biennial Regulatory Review, *Report & Order*, 18 FCC Rcd 13620, 13690 (2003).

¹⁶ 47 C.F.R. § 73.671(e)(3) (2005).

¹⁷ 47 C.F.R. § 73.671(e) (2005).

provides a 3-hour baseline, however, this broadcaster is free to fulfill its remaining 3-hour core programming obligation on Channel “B” by replaying up to 1.5 hours worth of core programs.

This interpretation is consistent with the Commission’s assumption that broadcasters are not excessively relying on repeats to fulfill their 3-hour core programming requirement, and are, presumably, providing a 3-hour baseline of non-repeat core programming.¹⁸ Applying the 50 percent rule to only the commensurate increase in core programming assures that broadcasters are achieving the overarching goal of the CTA “to increase the amount of educational and informational broadcast television programming available to children.”¹⁹ Most importantly, this interpretation avoids the problem of a broadcaster “simply replay[ing] the same core programming in order to meet [the Commission’s] revised processing guidelines”²⁰ by requiring the broadcaster to provide, at least, a 3-hour baseline of non-repeat core programming before being able to replay core programs and have them count toward that broadcaster’s obligation under the processing guideline.

However, it is possible to interpret the 50 Percent Rule to apply to the broadcaster’s total core programming obligation. Under this interpretation, the hypothetical broadcaster discussed above with two channels and a 6-hour core programming obligation can repeat 50 percent of its 6-hour core programming obligation, so that it only need to provide 3 hours of non-repeat programming on channel “A” and can simply repeat those 3 hours on Channel “B” to fulfill its total core programming obligation. This interpretation fails to address both the Commission’s

¹⁸ *Children’s DTV Order* ¶ 23 FN 55 (stating “there is no indication now that analog core programming is repeated excessively.”).

¹⁹ *1996 Order* ¶ 22, at 10671 (citing S. Rep. No.227, 101st Cong., 1st Sess. 1 (1989)).

²⁰ *Children’s DTV Order* ¶ 23.

“concern that higher programming benchmarks not be met by excessive repeats of core programming”²¹ and the programming needs of children.

The Coalition shares the Commission’s desire to make children’s educational programming diverse, varied, and effective and agrees with the Commission that limiting the use of repeats is necessary to achieve this goal. Therefore, the Coalition urges the Commission to clarify the rule so that broadcasters, at least, have to provide a 3-hour baseline of non-repeat children’s programming before they can repeat any core programs. Only then should a broadcaster be able to fulfill its core programming obligation through the use of repeat programs and even then, that broadcaster may only use repeated programs to fulfill up to 50 percent of its commensurate increase in required core programming. The Coalition strongly urges the Commission to clarify this rule so as to maximize the amount, variety, and age- and subject-diversity of children’s educational programming.

B. The Commission Should Revise Form 398 to Enable Adequate Monitoring of Broadcasters’ Reliance on Repeat Core Programming

In addition to clarifying how the 50 Percent Rule applies, the Commission should modify the Form 398 to collect data necessary to ensure compliance with the rule. At present, the Form 398 does not require broadcasters to disclose the extent to which core programming is replayed or repeated. Despite the Commission’s belief that that analog core programming is not being repeated excessively, Coalition representatives recently learned that at least one network does rely excessively on repeated core programming²² The Coalition representatives learned of the

²¹ *Id.* ¶ 23 FN 55.

²² Monitoring of Univision affiliates revealed that Univision affiliates have claiming to meet the three hour guideline by airing the same 90-minute program once on Saturday and again on Sunday.

excessive repetition by taping and viewing the core programs. It would be infeasible, however, for members of the public to conduct this kind of monitoring on a broad scale.

The Commission created Form 398 reports to “separate[e] the children’s programming reports from the rest of the public inspection file” in order to “facilitate public monitoring and increase broadcaster accountability under the CTA.”²³ Broadcasters clearly know the extent to which they repeat programs, and it would be easy to modify the form to collect this information. Unless the broadcasters are required to provide this information, it will be impossible for both the Commission and the public to determine whether broadcasters are complying with the 50 Per Cent rule and to accurately determine the quantity of core programming available for children. Moreover, as broadcasters transition to a digital television environment when a broadcaster will be able to air identical core programs on its different streams, monitoring a broadcaster’s efforts to provide effective core programming by tracking its reliance on replaying core programs will become even more difficult.

Because there are indications that some broadcasters may be excessively repeating core programs and because of the difficulties in determining whether a broadcaster is making a good faith effort to provide effective core programs, the Coalition urges the Commission to direct the Media Bureau Chief to revise Form 398 to require broadcasters to report the extent to which they replay core programs to satisfy their core programming obligations.²⁴

²³ 1996 Order ¶ 65, at 10692.

²⁴ *Children’s DTV Order* ¶ 87

II. THE COMMISSION SHOULD CLARIFY ITS RULE LIMITING PREEMPTIONS TO ENSURE THAT REGULARLY SCHEDULED PROGRAMS ARE IN FACT REGULARLY BROADCAST

In 1996, the Commission noted the reality that most “television programming, including children’s programming, consists of shows that air on a routine basis”²⁵ and that “[t]elevision series typically air in the same time slot for 13 consecutive weeks, although some episodes may be preempted. . . .”²⁶ Moreover, the Commission stressed the importance of having regularly scheduled children’s programs to ensure that parents and children can anticipate and locate particular shows.²⁷ The Commission stated:

Programming that is aired on a regular basis is more easily anticipated and located by viewers, and can build loyalty that will improve its chance for commercial success. . . We agree . . . that programs that air regularly can reinforce lessons from episode to episode [and] that regularly scheduled programs can develop a theme which enhances the impact of the educational and informational message.²⁸

To this end, the Commission required that core programming be “a regularly scheduled weekly program.” However, while the Commission recognized “evidence suggest[ing] that a significant number of educational and informational programs, especially those that air on Saturday, are preempted by sports and other programming,” the Commission decided to “leave it to the staff, with guidance from the full Commission as necessary, what constituted regularly scheduled programming and what level of preemption is allowable.”²⁹ Now, in the Children’s DTV Order, the Commission has quantified the allowable level of preemption and limited to number of preemptions to “no more than 10 percent of core programs in each calendar quarter.”³⁰ (“The Preemption Rule”) Moreover, “[e]ach preemption beyond the 10 percent limit will cause that

²⁵ 1996 Order ¶ 105, at 10710-11.

²⁶ *Id.* ¶ 106, at 10711.

²⁷ *Id.* ¶ 105, at 10710-11.

²⁸ *Id.*

²⁹ *Id.* ¶ 106, at 10711.

³⁰ 47 C.F.R. § 73.671(f) (2005).

program not to count as core under the processing guideline, even if the program is rescheduled.”³¹

The Coalition agrees with the Commission that this preemption limit should help parents and children locate and anticipate core programs and will improve the effectiveness of educational programming. However, the Coalition is concerned that the rule could be misinterpreted and fail to lead to the desired result. The ambiguity comes from the meaning of the phrase “core programs.”³² Specifically, it is unclear whether the 10 percent limit applies on a per-program basis or to the total amount of core programming per quarter.

The Coalition seeks clarification that “core programs” apply on a per-program basis and not to the total amount of core programming a broadcaster airs. For example, consider a broadcaster who meets its 3-hour requirement by airing six 30-minute core programs on Saturday starting at 8:00am and ending at 11:00am. If, during a 13 week quarter, the broadcaster preempts the core program starting at 10:30am two times, it has exceeded the 10 percent limit on preemptions. This hypothetical broadcaster will be unable to count the 10:30am program because the broadcaster will have exceeded the 10 percent limit on preemptions and, therefore, the program is not regularly scheduled. The net result is that this broadcaster be able to claim only 2.5 hours of core programming. Understanding the 10 percent limit to apply on a per-program basis reflects the Commission’s desire to ensure that core programs are both *regularly scheduled* and *regularly broadcast*, thereby improving the overall effectiveness of children’s educational programming.

³¹ *Children’s DTV Order* ¶ 41. Preemptions for breaking news are exempted from this preemption limit. *Id.*

³² 47 C.F.R. § 73.671(f) (2005).

An alternative interpretation of “core programs” leads to an entirely different result. If “core programs” refers to a broadcaster’s total amount of core programming, regardless of which stream generates the obligation, it could result in a broadcaster being able to claim, as core, a program airing only one or twice during a quarter. For example, take a hypothetical multicasting broadcaster with a 6-hour per week core programming obligation. In a 13 week quarter, this broadcaster will have to provide a total of 78 hours of core programming (6 hours per week x 13 weeks = 78). Under this alternative interpretation, this broadcaster can preempt 7.8 hours of its core programs (10% of its total core programming requirement of 78 hours). If the broadcaster airs a 30-minute program to fulfill part of its core programming obligation, then the broadcaster can preempt this program 12 times -- *every week except one* – for a total of 6 hours of preempted programming, and still meet its core programming requirement.

This interpretation would effectively undermine the Commission’s goal to ensure that regularly scheduled programs are regularly broadcast. Worse, in this extreme case, this interpretation would allow a broadcaster to count as a core program what is, functionally, more like a one-time special, thus undermining the Commission’s distinction between core educational programs, or regularly scheduled weekly programs, on one hand, and non-core programs such as “specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children,” on the other.³³

The Commission should clarify the Preemption Rule to limit the 10 percent preemption limitation to apply on a per-program basis. This interpretation will ensure that children have and can locate regularly scheduled educational programming.³⁴ Clarifying the rule will assure that a broadcaster must air, as scheduled, at least 90 percent of the episodes in a particular program

³³ 47 C.F.R. § 73.671(e)(1) (2005).

³⁴ 1996 Order ¶ 105, at 10710-11.

before the program is considered regularly scheduled and thus can be counted towards fulfilling that broadcaster's core programming requirement.

III. CONCLUSION

The Coalition commends the Commission's efforts to ensure that children benefit from the transition to digital television. While we support the rules limiting the number of repeats and pre-emptions, we request that the Commission clarify how those rules apply to ensure that they are not interpreted in a manner contrary to the goal of increased educational programming for children. In addition, we ask that the Commission amend Form 398 to collect information on the extent to which core programming is repeated.

Respectfully submitted,

/s/ Jennifer L. Prime

Of Counsel:

Brian Stone
Law Student
Georgetown University Law Center

Jennifer L. Prime, Esq.
Angela J. Campbell, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
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(202) 662-9535

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